



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwanyika v Kenya Wildlife Service (Cause E486 of 2021)  
[2022] KEELRC 4090 (KLR) (4 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4090 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E486 OF 2021**

**M MBARŪ, J**

**APRIL 4, 2022**

**BETWEEN**

**TRIZER VIULANCE WWUDA MWANYIKA ..... CLAIMANT**

**AND**

**KENYA WILDLIFE SERVICE ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a female. The respondent is a State Corporation.
2. On December 21, 2020 the respondent offered the claimant employment as the Head of Corporate Communications which offer she accepted and was placed under probation under the terms of employment.
3. The claimant reported to work on January 20, 2021 and worked until March 12, 2021 when she was suspended from duty and her employment terminated on May 11, 2021
4. The claim is that the suspension was unfair, irregular and unlawful. The subsequent termination of employment was contrary to fair procedure and Fair Administrative Act and Article 41 of the *Constitution*.
5. The suspension and termination of employment were actuated by malice on the part of the respondent on the grounds that there was no notice issued before termination of employment, there was no hearing, and the claimant was humiliated for having her contract terminated before it came to an end and without being given valid reasons. There was no justification or basis leading to termination of employment or an objective evaluation.
6. The respondent discriminated against the claimant on the grounds that the respondent violated the claimant and subjected her to termination of employment without justification or being given a fair



- opportunity to complete the probation period which violated her constitutional right and has suffered loss and damage.
7. The loss suffered is that the claimant was not paid any terminal dues;
    - a) Notice pay of Ksh 300,000;
    - b) 2 days leave Ksh 25,025;
    - c) Balance of salary for March and April, 2021 Ksh 335,300;
    - d) Pay for 11 days worked in May, 2021 Ksh 137,637;
    - e) Commuter allowance for March to May, 2021 Ksh 45,000;
    - f) 12 months compensation Ksh 3,603,600;
    - g) Airtime allowance for 4 months February to May, 2021 Ksh 24,000;
  8. And for these reasons the claimant is seeking for judgement against the respondent and a declaration that her employment terminated unfairly and an order of reinstatement to her employment as Head of Corporate Communication without loss of benefit and payment of damages for unlawful; termination of employment, damages for discrimination, pecuniary damages for loss of opportunity and costs of the suit.
  9. The claimant testified in support of her claim that upon employment by the respondent she worked diligently but on February 12, 2021 she was suspended from duty for undisclosed reasons save that she had not disclosed to the respondent that she had a case in court on-going in Mombasa. She had disclosed in her application that she had an EACC had cleared her and submitted to the respondent on August 28, 2020 and was cleared. She went through the interviews which were conducted by senior managers of the respondent on August 31, 2020 and a second interview on October 1, 2020 where the Director General was in the panel.
  10. Following the interviews, the claimant was called by the head of Human Resource on December 17, 2020 with information that she was the successful candidate and upon employment she went through the induction until her suspension. Afterwards, a blogger published an article claiming that the claimant had obtained employment using fake papers, was fronted by the Cabinet Secretary and that she had a pending case in Mombasa. She learnt of the blog after the Director General forwarded the same through whatsapp message.
  11. The claimant testified that she was called by human resource officer following the publication of the blog and they did a background check and established that her certificates were genuine and requested for information about the court case and which details she volunteered and forwarded through email on March 11, 2021. The next day she was suspended on the grounds that she failed to disclose that she had a case in Mombasa during the interviews yet she had been cleared by EACC and DCI.
  12. During the suspension, the claimant was directed to report to the Director General every two weeks which she did until May 11, 2021 when she was issued with letter terminating employment which matter has damaged her reputation, caused loss and damage and effectively rendered her jobless and unable to pay up her loans, insurance and other family expenses.
  13. The claimant testified that before joining the respondent she had resigned from her previous employment through notice dated December 28, 2020. The action by the respondent rendered her jobless.



## Response

14. The response is that on May 26, 2020 the respondent advertised for the position of Head of Corporate Communications and received several applications including that of the claimant.
15. In compliance with the *Leadership and Integrity Act*, it was a requirement that applicants seek EACC clearance as evidence of partial compliance with Chapter Six of the *Constitution*. due to COVID -19 pandemic restrictions, EACC in consultation with the State Corporations Advisory Committee suspended the submissions of hard copy self-declaration forms for those seeking employment until further notice and advised that no job applicants should be prejudiced in a circular dated April 8, 2020.
16. The respondent submitted details of candidates who met the requirements set out in the advert to EACC for integrity verification as required and obtained clearance and the Anti-Corruption Commission informed the respondent that it had not undertaken any investigations any investigations where the claimant was found culpable.
17. It was a requirement of the interview and prior to reporting on duty for the successful candidate to obtain and submit Police Clearance certificate. The claimant submitted Certificate Ref No, PCC-ZLTPVXXE dated December 14, 2020 to the respondent and she was thereafter interviewed and emerged the successful candidate. She was issued with letter dated December 21, 2020 being offer of employment and which she accepted and reported on duty on January 20, 2021 and placed on probation for 6 months.
18. Prior to completing the probation period, the respondent learnt that the claimant had been charged in Criminal Case No 6 of 2018 for wilful failure to comply with applicable laws relating to procurement in contravention of the *Anti-Corruption and Economic Crimes Act*. The respondent engaged the claimant to ascertain the existence of such criminal matter against her and in response informed the respondent that she was due to attend court on March 10, 2021 as the case had not been terminated. The respondent then suspended the claimant on the grounds of Section 62(1) of the *Anti-Corruption and Economic Crimes Act* which provides that public officers charged in corruption or economic crimes shall be suspended at half pay and further that the claimant did not disclose that she was charged with a criminal case in Mombasa prior to her employment.
19. The respondent received letter from the EACC dated April 13, 2021 confirming the claimant had been charged under the *Anti-Corruption and Economic Crimes Act* and advised the respondent that public officers suspended under the same should not hold public office until they were cleared by the court.
20. Termination of employment was not unfair, unlawful as alleged. The respondent had valid reasons to lawfully terminate employment under the provisions of the *Anti-Corruption and Economic Crimes Act and the Leadership and Ethics Act* and the claims made are not justified.
21. No witness was called and the respondent did not attend at the hearing despite being issued with notice.
22. At the close of the hearing, parties were directed to file written submissions. Only the claimant complied.

## Determination

23. On March 12, 2021 the respondent suspended the claimant from duty on the grounds that;
24. Following your appointment in the position of ... effective January 20, 2021 and subsequent receipt of information to the effect that you have a criminal case in Mombasa which you did not disclose to management, it has been decided to suspend you from duty with immediate effect.



- ...
25. You are required to be reporting to the undersigned once every two (2) weeks until management gives further directions and you should hand over your current responsibilities to your deputy immediately.
- ...
26. The purpose of the suspension was not stated save that the claimant was alleged to have failed to disclose that she had a criminal case in Mombasa.
27. The purpose of the suspension is outlined in the Response filed to the Memorandum of Claim that suspension was on the grounds of Section 62(1) of the *Anti-Corruption and Economic Crimes Act* which provides that public officers charged in corruption or economic crimes should be suspended at half pay. That in this case, the claimant did not disclose that she was charged with a criminal case in Mombasa prior to her employment.
28. This matter and requirements of Section 62(1) of the *Anti-Corruption and Economic Crimes Act* is further reinforced by letter dated April 13, 2021 by the EACC. This was after the fact of suspension.
29. The EACC further advised the respondent that;
30. Further be advised that pursuant to the provisions of the *Leadership and Integrity Act*, 2012 as read together with Article 73(1) (a) (iV) and 75(1) (2) (c) of the *Constitution* of Kenya, 2010, a public officer who has been suspended by the anti-corruption court cannot hold any active public office until he/she is cleared by the Anti-corruption court.
31. The purpose of a suspension under the provisions of the *Leadership and Integrity Act* and the *Constitution*, 2010 was hence clarified. Such required an employee not to hold any active public office until cleared by the Anti-corruption court.
32. On May 11, 2021 the respondent wrote to the claimant and terminated her employment on the grounds that;

### **Termination of Probationary Appointment**

33. Following your earlier suspension from duty on account of failure to disclose to management on your appointment that you have a pending case before the Anti-corruption Court in Mombasa and subsequent deliberation of the Board of Trustees in its meeting held on March 19, 2021////, it has been decided to terminate your probationary appointment with immediate effect in accordance with Section “T.4” of the KWS Human Resource Policy & Procedures Manual, 2014. ...
34. In employment and labour relations, an employer is allowed to suspend an employee from duty as an administrative measure and for stated reasons. Such is to allow the employer address a matter which requires the removal of the employee from the shop floor.
35. In this case, as noted in the letter dated March 12, 2021 the claimant was alleged to have failed to disclose that she had a criminal case in Mombasa.
36. It is not contested that prior to employment, the claimant was required to undertake clearance with the EACC and the DCI which she did. She was cleared and her appointment by the respondent processed and was issued with a letter of appointment.
37. In the case of *Chripus Ileli Kunuva v County Government of Kitui & another* [2020] eKLR the court held that the employer has the prerogative to suspend an employee as an administrative action to allow for investigations. Once an employee is placed on suspension, the subject matter leading to such



administrative action must be addressed and if no matter has arisen to require the employee to respond to, then she must be recalled back to work and continue with her employment.

38. In the case of *Elizabeth Cherono Kurgat versus Kenya Literature Bureau* [2014] eKLR the court in addressing the issue of sending an employee on suspension held as follows;

“... the Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.”

39. Inherently, a suspension is meant to pave way for investigations or as required. The employee is removed from the shop floor to be recalled for a hearing and where the investigations do not require a hearing, the employee is recalled back to work.
40. Ultimately, in employment and labour relations and unlike the procedures attendant in criminal or anti-corruption case, a suspension must be addressed through the due process outlined under Section 41 of the *Employment Act*, 2007.
41. Whereas the *Leadership and Integrity Act* requires a public officer charged in a criminal case to be suspended from office until cleared by the Anti-corruption court, internal disciplinary procedures in employment and labour relations are regulated under the provisions of the *Employment Act*, 2007 and the internal disciplinary procedures of the employer. The two may be interrelated in that an employee who is arrested and charged in a criminal case may be required to attend and address the criminal charges but the employer should never lose sight of the fact that the employment relationship is regulated under the regime of the *Employment Act*, 2007.
42. In *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others* [2013] eKLR the court held that;
43. The section 62 [of the *Anti-Corruption and Economic Crimes Act*] must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the *Constitution*. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted the full benefits are restored. If the person is convicted, then the suspension merges into a penalty.
44. Also in the case of *Moses Muteithia & 5 others v Jacob Muthomi Kirera & 4 others* [2017] eKLR the court held that;

“Therefore, I am not able to find any violation of right to be presumed innocent until proven guilty, when a person charged with offences to do with corruption, economic crimes and integrity is suspended at half pay pending conclusion of his case. As I have already stated, section 62(1) of *ACECA* imposes a statutory obligation on the 2<sup>nd</sup> and 5<sup>th</sup> Respondent to suspend at half pay any public officer who has been charged under *ACECA*. Accordingly, the 1<sup>st</sup> Respondent ought to have been suspended at half pay pursuant to the provisions of Section”



62 of ACECA as no prejudice would have been suffered by the 1st Respondent.

45. Suspension from employment in itself is not a sanction.
46. In employment and labour relations, before employment is terminated, the employer is bound by the provisions of Section 41 of the Employment Act, 2007 as set out above that;
  1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
47. Even where the employer is of the view that the employee has committed a serious and gross matter, before employment is terminated, the due process requires that the employee must be issued with notice and allowed to attend and make representations and be allowed to be accompanied by a fellow employee of her choice.
48. The Court of Appeal in addressing the mandatory nature of Section 41 of the Employment Act, 2007 in the case of National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR held that;

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”
49. In Doshi and Company (Hardware) Limited v Karisa Charo Mwayaya [2022] eKLR the court reiterated the mandatory nature of Section 41 of the Employment Act, 2007 provisions. Where the employer fails to abide the due process outlined therein, the resulting termination of employment is procedurally unfair and fundamentally such negates such action.
50. The Court of Appeal well summarised the import and implication of failure to adhere to due process in the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR that;

“Section 45 of the Act makes provision; inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with Section 41. Section 41 enjoins the employer, in mandatory terms, before terminating



the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer"

51. In the letter terminating employment dated May 11, 2021 the respondent noted that deliberations of the Board of Trustees in its meeting held on March 19, 2021, it has been decided to terminate your probationary appointment with immediate effect.
52. The respondent hence had opportunity to meet and address the claimant's case save in her absence. She was condemned unheard. She was not issued with notice or allowed an opportunity to defend herself before the employer and in the presence of her representative.
53. The decision taken against the claimant to terminate her employment was premature, it lacked substantive and procedural fairness. There is no justification. The reasons of being on probation cannot apply to justify lapse in due process. See ELRC Petition No 94 of 2014 - *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR where the bench declared the provisions of Section 42(1) of the *Employment Act, 2007* unconstitutional for failure to accord the employees on probation the due process of Section 41 of the *Employment Act, 2007*.

#### **Employment Terminated Unlawfully And Unfairly.**

54. The claimant has cited that she was discriminated against by the respondent. she however did not delve into this matter save to state she was not allowed to complete her probationary period.
55. On the reliefs sought, the claimant is seeking reinstatement back to her employment without loss of benefits. Reinstatement will require the claimant to return to the shop floor as Head Corporate Communications. Reinstatement would return the claimant to a hostile employer who is not keen to follow the due process. Such remedy would only place her in danger of frustration.
56. In this regard, a reinstatement would not be ideal even though the claimant had already resigned from her previous employment to take up employment with the respondent upon a successful interview process and clearance by EACC and DCI.
57. The remedy of compensation for unfair termination is hereby found appropriate and taking into account the findings above, payment of 6 months gross salary is hereby found appropriate. The claimant was earning Ksh 300, 000 a month. Compensation is hereby awarded at Ksh 1, 800,000.
58. In the letter terminating employment, notice pay was placed at one month's salary. Such is due if not paid all at Ksh 300, 000.
59. Leave pay prorated for 5 months is due pursuant to section 28 of the *Employment Act, 2007*. For the 4 full months, the claimant is entitled to 2 leave days at Ksh 20, 000.
60. The balance of salary for 11 days worked in May, 2021 is due as the claimant was the employee of the respondent until such date. the claimant is entitled to Ksh 110, 000.



61. Commuter allowance claimed is for a period the claimant was on suspension save she was directed to report to the Director General every two weeks. Such benefit accrued and is hereby awarded at Ksh 45, 000.

62. On the claim for airtime benefit, such matter is not addressed in the employment contract.

63. On the findings above, the claimant is entitled to costs.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a. A declaration that employment terminated unlawfully and unfairly;
- b. Compensation awarded at Ksh 1,800,000;
- c. Notice pay Ksh 300,000 if this has not been paid;
- d. Leave pay Ksh 20,000;
- e. Pay for 11 days worked in May, 2021 Ksh 110,000;
- f. Commuter allowance Ksh 45,000;
- g. The dues above (b), (c), (d) and (e) shall be paid within 45 days failure to which the same shall accrue interests from the date due and until paid in full;
- h. The claimant is awarded costs.

**DELIVERED IN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL, 2022.**

**M. MBARŪ JUDGE**

**In the presence of:**

**Court Assistant: Okodoi**

..... **and** .....

